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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-164

PASADENA CITY BOARD OF EDUCATION, ET AL.,
Petitioners,

vs.

NANCY ANNE SPANGLER, ET AL.,
UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP); LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; and the CENTER FOR NATIONAL POLICY REVIEW ON RACE AND URBAN ISSUES, as *AMICI CURIAE*

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Interest of *Amici* [1]

Amici are nonprofit, charitable organizations which have each strived, since their respective establishment, to end official discrimination against racial, ethnic, and

[1] Letters from counsel for the parties herein, consenting to the filing of this Brief *Amici Curiae* on behalf of the NAACP or the Lawyers' Committee for Civil Rights Under Law, have been filed with the Clerk of this Court pursuant to U.S. Sup. Ct. Rule 42(2).

other minorities. Each has been significantly involved, in the period since this Court's decisions catalyzed the rapid elimination of dual biracial school systems in the South,[2] in efforts to identify and end discriminatory actions of school authorities throughout the Nation which have restricted the educational opportunities of minority group children.[3]

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[2] *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968); *Monroe* v. *Board of Comm'rs*, 391 U.S. 450 (1968); *Raney* v. *Board of Educ.*, 391 U.S. 443 (1968); *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 226 (1969), 396 U.S. 290 (1970); *Northcross* v. *Board of Educ. of Memphis*, 397 U.S. 232 (1970); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Davis* v. *Board of School Comm'rs of Mobile*, 402 U.S. 33 (1971).

[3] The National Association for the Advancement of Colored People (NAACP) is a nonprofit membership association representing the interests of approximately 500,000 members in 1700 branches throughout the United States. Since 1909, the NAACP has sought through the courts to establish and protect the civil rights of minority citizens. NAACP attorneys have often appeared before this Court, representing the organization as an *amicus* or on behalf of individual litigants in cases involving school desegregation, employment, voting rights, jury selection, capital punishment, and other cases involving fundamental human rights.

The Lawyers' Committee for Civil Rights Under Law was organized on June 21, 1963, following a conference of lawyers called at the White House by the President. The Committee's principal mission is to involve private lawyers throughout the country in the struggle to assure all citizens of their civil rights through the legal process, in particular by affording legal services otherwise unavailable to Black and other minority Americans pursuing claims for equal treatment under law. The Lawyers' Committee is a nonprofit, private corporation whose Board of Trustees includes thirteen past presidents of the American Bar Association, three former Attorneys General, and two former Solicitors General.

The Center for National Policy Review on Race and Urban Issues was established in 1970 as a public interest law center at the Catholic University Law School with the support of private foundations. The Center's principal mission is to provide research assistance and legal representation seeking to vindicate the rights of minority and low income citizens through the federal administrative process. The Center has provided such administrative representation and has also served as counsel or *amicus* in court cases involving equal educational opportunity, housing, mortgage lending discrimination and employment.

The NAACP or its constituent branches have been plaintiffs in a number of school desegregation actions, and the organization has furnished attorneys who represented individual plaintiffs in scores of other cases; NAACP attorneys participated in the proceedings which led to this Court's decision in *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), 349 U.S. 294 (1955) and *Milliken* v. *Bradley*, 418 U.S. 717 (1974), for example. The Association and its attorneys are currently involved in numerous active school desegregation matters.

The Lawyers' Committee and its staff have a long history of support for, and participation in, school desegregation litigation. For example, the Committee filed a brief and participated in oral argument as *amicus curiae* in *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); through its efforts, volunteer attorneys assisted the plaintiffs in numerous proceedings which resulted from this Court's decision in *Alexander*, *e.g.*, *Gordon* v. *Jefferson Davis Parish School Bd.*, 446 F.2d 266 (5th Cir. 1971). More recently, staff and volunteer attorneys of the Lawyers' Committee have assisted in representing plaintiffs in such cases as *Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975), and *Brinkman* v. *Gilligan*, 518 F.2d 853 (6th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3331 (Dec. 1, 1975).

The Center and its staff have focused attention on the statutory responsibility of the Department of Health, Education and Welfare to prevent racial discrimination in public school systems of the North and West, publishing an investigative report, *Justice Delayed and Denied: HEW and Northern School Desegregation* (1974) and participating as counsel in the pending case of *Brown* v. *Weinberger*. Among the cases in which the Center has participated as counsel or *amicus* before this Court are *Bradley* v. *School Bd. of Richmond*, 412 U.S. 92 (1973) and *Evans* v. *Buchanan*, 44 U.S.L.W. 3299 (Nov. 17, 1975). The Center has also conducted or sponsored research on issues of educational equality.

Considerable progress has been made—although much remains to be accomplished. Despite the headlines and apprehensions of any particular moment, the number of districts (North and South) which have desegregated their schools, accepted their Constitutional obligation to prevent the reappearance of discrimination, and moved to improve the quality of education for *all* their students

is steadily increasing. Prime among the many factors responsible for this achievement has been this Court's unwavering dedication to the effectuation of *Brown* within school districts which have been found to have discriminated against racial or ethnic minorities in the past,[4] and the courageous, meticulous attention given school desegregation cases by many United States District Judges. In turn, the consistency of the legal process has fortified the resolve of school boards and other local agencies which have moved voluntarily to end official discrimination and to eliminate its vestiges.[5]

With this appreciation for the critical importance of this Court's pronouncements, *amici* were naturally concerned when the Court agreed to review the affirmance of a district court decree requiring school authorities (in a case involving intentional creation of segregated schools) to maintain a desegregated school system for a fourth school year after the finding of violation and issuance of a remedial decree.[6] Subsequent review of the rec-

[4] *E.g., Cooper* v. *Aaron*, 358 U.S. 1 (1958) (official intransigence and interposition); *Griffin* v. *County School Bd.*, 377 U.S. 218 (1964) (evasion by closing schools); *Monroe* v. *Board of Comm'rs, supra*, 391 U.S., at 459 (threatened "white flight"); *Alexander* and *Carter, supra* (delay); *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972); *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972) (creation of "splinter districts"); *Keyes* v. *School Dist. No. 1, Denver*, 413 U.S. 189 (1973) (claims that unconstitutional actions affected only portion of school district).

[5] *See, e.g., Balsbaugh* v. *Rowland*, 447 Pa. 157, 290 A.2d 85 (1972); *State ex rel. Citizens Against Mandatory Busing* v. *Brooks*, 80 Wash. 2d 121, 492 P.2d 536 (1972); *Citizens Against Mandatory Busing* v. *Palmason*, 80 Wash. 2d 445, 495 P.2d 657 (1972); *cf. McDaniel* v. *Barresi*, 402 U.S. 39 (1971).

[6] This is only the second school board petition for certiorari in a desegregation case which has been granted since *Brown*; in the previous instance, the Court declined to endorse the lower courts' requirement of an inter-district remedy, but remanded the case with instructions to provide a within-district remedy for the dual school system which had been proved. *Milliken* v. *Bradley, supra*, 418 U.S., at 752-53.

ord has convinced *amici* that the limited judgment of the Court of Appeals was appropriate in the circumstances of this case. For that reason, a reversal of that judgment may be interpreted by segments of the public, and of the federal judiciary, as a dilution of the substantive content of the Fourteenth Amendment as it affects racial segregation in education. It is with the hope of preventing any such result that *amici* submit this Brief.

Statement

In our view, Petitioners' Statement of the case distorts the record and judgment below in two respects critical to the disposition of this case: First, the district court's original judgment of violation six years ago was predicated on a showing of intentional segregation, not mere racial imbalance as Petitioners contend (Pet. Br., pp. 3-4). Second, the 1975 judgment of the Court of Appeals (the precise judgment now under review) expressly disapproves, and does not sanction (as Petitioners assert, Pet. Br., p. 9), the imposition of a particular racial quota for the foreseeable future.

1. *The 1970 Violation Judgment.* Although Petitioners have obtained review of an order in a school desegregation case which is clearly *remedial* in nature (to wit, one which denies their request to alter a previously approved desegregation plan), they have sought to create an atmosphere unfavorable to the district court's action by making pejorative comments about the district court's original, almost six-year-old judgment that the Constitution had been violated by Pasadena school authorities. It is therefore important that the nature of the district court's 1970 holding on liability be properly portrayed.

Petitioners charge that in the proceedings on liability, the "trial court operated on the invalid assumption that

racial imbalance and segregation were one and the same . . . . The failure of the Pasadena School Board to correct this racial imbalance *was the primary basis on which the system was found to be a dual system* and, therefore, constitutionally defective." (Pet. Br., p. 3) (emphasis supplied). In support of this assertion, Petitioners quote only three of 54 factual findings entered by the district court in support of its judgment (Pet. Br., pp. 3-4.) A review of the entire detailed, and unchallenged, factual findings of the district court demonstrates a consistent, intentional, discriminatory course of conduct by Pasadena school authorities over several decades in all areas of school administration.[7]

It is clear, in this context, that the district court did not confuse the descriptive phenomenon of "segregation-imbalance" with the legally significant factor of *intentional official action*[8] resulting in that segregation.[9] The

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[7] Included in these intentional policies were: (1) busing white students past Black schools to other white schools, 311 F. Supp., at 507; A. 100-01; (2) making, or refusing to make, attendance boundary changes with the end result of increasing racial predominance in both Black and white schools, 311 F. Supp., at 507-10; A. 100-05; (3) locating new schools and constructing additions to existing facilities so as to maximize segregation, 311 F. Supp., at 517-19; A. 119-23; (4) grouping students within schools so as to segregate individual classes according to race, 311 F. Supp., at 519-20; A. 123-25; (5) granting racially motivated transfer requests which exacerbated segregation, 311 F. Supp., at 520; A. 125-26; (6) discriminating in the hiring of faculty, staff and administrators, 311 F. Supp., at 515-16; A. 115-18; and (7) racially allocating faculty, staff and administrators in a manner which further identified schools as "Black" or "white," 311 F. Supp., at 513-15; A. 112-15.

[8] *Keyes* v. *School Dist. No. 1, Denver, supra,* 413 U.S., at 208.

[9] The distinction is consistently reflected in this Court's opinions. *Cf. Keyes, supra,* 413 U.S., at 232 (Powell J., concerning in part and dissenting in part): "The issue in these cases will not be whether segregated education exists. This will be conceded in most

district court did not proceed from a finding of "segregation-imbalance" to the conclusion that Petitioners were Constitutionally obligated to integrate their schools. Such a holding could have come without the necessity of a trial, since the enrollment and faculty assignment figures were undisputed. Instead, the court's findings specify in great detail how the activities of Pasadena school officials, from 1934 to the date of trial, had created, maintained, and exacerbated segregation in the district's schools.[10]

Given these amply supported findings, it is simply not accurate to say that the district court's "findings of violations were based not so much on affirmative acts of

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of them." Were the existence of "segregation" sufficient to demonstrate an unconstitutional practice, this Court would not have carefully distinguished in *Swann* and *Keyes* between *de jure* and "so-called *de facto*" segregation. *See* 402 U.S., at 17-18; 413 U.S., at 208. And while these terms may be more descriptive of legal attributes rather than objective conduct, *see* 413 U.S., at 232-36 (Powell, J.), the fact remains that they are distinguished in practice by the existence of evidence from which intentional official action resulting in the segregation can be inferred. *Id.*, at 208 (Opinion of the Court).

[10] The subheadings of the district court's findings are instructive in this regard: "III. Segregation of Students . . . A. The Fact of Racial Segregation . . . B. Defendant's Actions and Inactions that Have Contributed to and Intensified Racial Separation . . . ." *Cf. Kelly* v. *Guinn,* 456 F.2d 100, 106 n. 6 (9th Cir. 1972), *cert. denied,* 413 U.S. 919 (1973): "Whatever the district court may have meant by its occasional references to 'de facto segregation' in the Clark County School District, it is clear from the language of the district court quoted in the text that the court did *not* define the term, as the Supreme Court did in *Swann,* as referring to a situation 'where racial imbalance exists in the schools *but with no showing that this was brought about by discriminatory action of state authorities*'" (emphasis in original). The point is that the particular language used to describe either the fact of segregation or its unconstitutional cause should not obscure the substance of findings of intentional misconduct. *Cf. Brinkman* v. *Gilligan, supra,* 518 F.2d, at 854. Indeed, the substance of even the "inaction" findings is that Pasadena school authorities purposefully resolved to maintain segregation. *Id.* at 510-11; A. 105-09. *Compare Keyes, supra; Milliken* v. *Bradley, supra.*

segregation by Petitioners, as on their failure to act to prevent 'racial imbalance.'" Petition for Writ of Certiorari, at p. 3. In sum, this Court's consideration of the remedial actions of the district court should be undertaken free of any residual suspicions about the findings of a Constitutional violation in Pasadena which Petitioners have endeavored to create.

2. *The Court of Appeals' Ruling.* Similarly, the suggestion (Pet. Br., pp. 8-9) that the judgment of the court below authorizes the imposition of a particular racial quota for the foreseeable future misconceives the true facts. To understand this mischaracterization of the judgment below, a cursory review of the prior proceedings is required.

As noted, in 1970, the district court found that Petitioners or their precedessors had, through deliberate, official, discriminatory actions, created and maintained a dual school system in Pasadena. The court accordingly required submission of an affirmative remedial plan which would, among other things, alter pupil assignments so that no school would be racially identifiable: in the particular context of Pasadena, the court directed that no school should draw a majority of its 1970-71 enrollment from any one minority group.[11] Such a plan was

[11] *Compare, e.g., Keyes, supra,* 413 U.S., at 195-98. Pasadena enrolls students of three minority groups which have historically been discriminated against in California: Blacks, Chicanos—*see, e.g., Westminister School Dist.* v. *Mendez,* 161 F.2d 744 (9th Cir. 1947); *Soria* v. *Oxnard School Dist.,* 386 F. Supp. 539 (C.D. Cal. 1974)—and Chinese—*see, e.g., Lee* v. *Johnson,* 404 U.S. 1215 (1971) (Douglas, J., in Chambers). (A. 440.) However, the district court's order of March 10, 1970 approved Petitioners' plan which contemplated school populations more than 50% combined minority, such as Arroyo-Garfield. (A. 92, 96.) In 1970, the Pasadena school district's enrollment was 33% Black, 10% Chicano, and 3% Asian (A. 440). Thus, the "no majority of any minority" guideline contemplated greater racial and ethnic variation in enrollments than in *Swann* (9% Black to 38% Black) and countless other cases. *See* pp. 15-16 *infra.*

prepared by the school system staff and approved by the district court. In its initial year of implementation, it met the court's guidelines with respect to school enrollments.

However, in the three succeeding years, the plan did not achieve these results. An increasing number of schools were distinguishable by increasingly large Black enrollments. Petitioners did not alter their plan in the face of these developments nor otherwise advise the district court of any change in circumstances, despite its continuing jurisdiction.[12] Instead, in 1974, Petitioners finally filed a four-part motion (A. 232) asking for modification of the court's 1970 orders by (1) withdrawing the injunction requiring them to implement the desegregation plan approved by the district court in 1970; (2) withdrawing the injunction insofar as it required that the plan avoid school enrollments which were "majority-minority"; (3) permitting them to implement a new pupil assignment plan attached to the motion; and (4) dismissing the case. Certain "changed circumstances" and exigencies were claimed by Petitioners to justify the relief which they sought: the decline in the system-wide proportion of white students, from 58% to 44%, Petitioners claimed, made avoidance of "majority-minority" schools infeasible; the K-3, 4-6 elementary school organizational pattern embodied in the Pasadena Plan,

[12] To the contrary, Petitioners' *post hoc* litigation contention is that implementation of the 1970 pupil assignments operated *instanter* to fulfill their responsibility: "[the] Pasadena Plan . . . extirpated all remnants of school segregation immediately." Pet. Br., p. 4. Their 1974 motion for modification contended both that they had "complied with the mandate of this Court relating to a unitary school district" and that demographic changes had "made it a practical impossibility to continue to comply with the portion of the judgment of this Court which required that there be no school in the district 'having a majority of any minority students.'" (A. 233, 237.) The district court found compliance was feasible, and that the vestiges of discrimination had not been eliminated.

they said, prevented desirable educational modifications offering parents a choice of instructional techniques and curricular emphases for their children. In addition, Petitioners averred that modification of the 1970 decree was justified because the decree had caused the drop in white enrollment in the district (and was, thus, an unsatisfactory mechanism for discharging Petitioners' affirmative duties); and that, far from contributing to the achievement of equal educational opportunities, the Pasadena Plan had resulted in lower educational attainment by both Black and white students.

Following a hearing, the district court denied the Petitioners' alternative motions. *Spangler* v. *Pasadena City Bd. of Educ.*, 375 F. Supp. 1304 (C.D. Cal. 1974); A. 452. The court ruled that it had intended its 1970 decree to require that Petitioners prevent (unless it were not feasible) the recurrence of school enrollments in which minority-race students constituted a majority;[13] that reassignments to achieve this end were still feasible; that implementation of the 1970 decree had caused neither unusual loss of white students (compared to other California districts) nor deterioration in academic achievement; and that Petitioners' alternative plan, which was based on "free choice" assignments, was intended to and likely would result in the immediate reestablishment

[13] In a remark at the hearing, the district court made the following statement concerning the plan submitted by the school board pursuant to the 1970 order: "Now, what that meant to me that at least during my lifetime there would be no majority of any minority in Pasadena." (A. 220.) Whether this remark is read as an offhand release of tension by a district judge vexed by what he perceived as a recalcitrant school board disavowing its own proposal to make readjustments (*see* A. 10), or as a verbal gloss otherwise omitted from the district court's final written order, the remark was specifically removed from the judgment now under review; for the Court of Appeals' majority specifically rejected any notion that annual reassignments or an immutably fixed racial percentage could be imposed. See discussion *infra*, pp. 13-18.

of a racially segregated school system, and was therefore a Constitutionally unacceptable remedial measure.

The Court of Appeals affirmed, but with important clarifications. *Spangler* v. *Pasadena City Bd. of Educ.*, 519 F.2d 430 (9th Cir. 1975); Petition for Writ of Certiorari, at p. A1.[14] Contrary to Petitioners' suggestion (Pet. Br., p. 14), the two judges in the majority below, in their separate opinions, both agreed that the district court could not require "annual" or other adjustments to maintain schools without a majority of enrollment composed of minority-race students *after* a plan had worked for a sufficient period of time to justify the conclusion that a unitary system had been established. 519 F.2d, at 438, 440.[15] Thus, the propriety of requiring annual reassignments to

[14] The peculiar procedural posture of the case prevented modification or reversal in part. The district court's 1970 decree required submission and implementation of a pupil assignment plan sufficient that "by or before the beginning of the school year that commences in September of 1970, there shall be no school in the District, elementary or junior high school, or senior high school, with a majority of any minority students." 311 F. Supp., at 505; A. 3-4. A subsequent district court judgment (A. 96) approved the particular plan submitted by Pasadena—a plan in which the school board itself proposed annual adjustments (A. 10). The language of the decree does not explicitly require continual reassignments; indeed, Petitioners argue here that not until the 1974 hearings did they understand the decree in this fashion (Pt. Br., pp. 6-7). The quoted provision of the decree, as written, thus established a remedial standard based upon both feasibility and system-wide racial composition (*see infra*, pp. 13-18); only with whatever additional gloss the district court's verbal remark almost four years later placed upon it, *see* note 13 *supra*, could the decree have been understood to require continued annual reassignments throughout the district judge's lifetime. The Court of Appeals properly tailored its opinion to disapprove only the unwritten subsequent gloss on the actual words of the decree (Judge Chambers commented that "the message is clear to the district court," 519 F.2d, at 440). There was thus no occasion to vacate or modify the decree itself.

[15] Judge Wallace's dissenting opinion did not suggest that Petitioners were unquestionably entitled to the relief they seek in this Court. Rather, it suggested a remand for further proceedings. In Judge Wallace's view, the judgment "whether 'the affirmative duty

preserve a particular racial balance is simply not before this Court on review of the judgment or opinion below, whatever one might reasonably have read into the oral remark of the district court concerning its original order.

Summary of Argument

I

Neither the district court's original judgment on remedy in this case, nor its 1974 denial of the relief sought by Petitioners, may properly be construed as requiring "racial balance" or quotas. The decrees were based upon the trial court's accurate assessment of the facts and circumstances about the *de jure* segregated Pasadena school system which were pertinent to the fashioning of a feasible remedy that achieved "the greatest possible degree of actual desegregation," *Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra.*

II

Petitioners failed in the trial court to present evidence which would justify either termination of this lawsuit or modification of the original remedial decree. Sound

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to desegregate had been accomplished and racial discrimination through official action is eliminated from the system" requires a district court to determine, whenever modification of a school desegregation plan is sought, "whether the segregation foreseeable upon dissolution of the injunction is attributable to intentionally segregative actions of the school district." 519 F.2d, at 444. As Judge Wallace's opinion intimates, this result would transform every modification hearing into a search for a new constitutional violation. 519 F.2d, at 445-46, text at notes 9 and 10. *Compare Morgan* v. *Kerrigan*, No. 75-1184 (1st Cir. January 14, 1976), slip op. at pp. 23-28. But this Court has made clear that district courts' continuing remedial jurisdiction does not depend upon a showing of independent violations. *Wright* v. *Council of the City of Emporia, supra; United States* v. *Scotland Neck City Bd. of Educ., supra; Raney* v. *Board of Educ., supra.*

principles of equity jurisdiction, as well as the Constitutional principles respecting school desegregation which have been enunciated by this Court, support and would require the district court to maintain its supervision of this case. In particular, the court acted properly in refusing to permit the adoption of a pupil assignment plan whose foreseeable result was a return to segregation.

III

The judgment below should be upheld in order to avoid encouraging the invention of new schemes to frustrate the mandates of the Fourteenth Amendment.

ARGUMENT

I

The Remedial Standards Embodied In The District Court's 1970 Order Are Proper Under *Swann* And The Fourteenth Amendment.

Petitioners insist that this Court is "obliged to reverse" the judgment below, either because the district court's order was "invalid *ab initio*" in 1970, or because its denial of Petitioners' motion to modify the order was similarly void. (Pet. Br., pp. 13, 14.) The basis for these conclusions is Petitioners' contention that the 1970 order mandates a "rigid racial balance" in Pasadena's schools which is proscribed by this Court's decision in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra.* But, as an understanding of the actual rulings below shows (*see* Statement, *supra*), the case cannot be dealt with so simply. Petitioners' arguments would exalt semantic form over Constitutional substance.

The 1970 decree contained, on its face, a limitation as to the sort of pupil assignment plan which the district court considered acceptable to meet Petitioners' Constitutional obligations:

> The plan shall include procedures to be followed and goals to be attained in connection with the location and construction of facilities, both permanent and transportable, that will reduce racial segregation in the District. The plan shall provide for student assignments in such a manner that, by or before the beginning of the school year that commences in September of 1970 there shall be no school in the District, elementary or junior high school or senior high school, with a majority of any minority students.

311 F. Supp., at 505; A. 3-4. This language was not a directive requiring racial balance.

The true nature of the order was aptly characterized by the United States in its Brief *Amicus Curiae* in *Swann*. There the government cited the present case with approval, in the course of a discussion which argued that Judge McMillian's orders in the *Swann* case did in fact go too far in the direction of racial balance:[16]

> [T]he standard of no predominantly Negro schools has been used as a means of translating into remedial terms a finding, in view of available alternatives, of the extent to which racial concentration could feasibly be eliminated.[17] See, *e.g.*, *Spangler and United States* v. *Pasadena City Board of Education*, unreported order entered on findings and conclusions reported at 311 F. Supp. 501 (C.D. Calif.). Such an articulation of remedial obligations cannot be read in the unyielding [racial balance] terms suggested by the plaintiffs-petitioners. . . . Insofar as such remedial expressions are made on the basis of a record and findings on "the availability to the board of other more promising courses

[16] This Court disagreed with the government's characterization of the *Swann* orders. *See* text *infra*, at note 19.

[17] In this case, the district court had heard testimony concerning viable desegregation measures before it fashioned its remedial decree. *See* 311 F. Supp., at 513 ¶ 28; A. 111.

> of action," 391 U.S. 439, they represent no departure in constitutional principle from *Green*, which directed district courts to assess proposed plans "in light of any alternatives which may be shown as feasible and more promising in their effectiveness." *Ibid.*

(Brief for the United States as *Amicus Curiae*, *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, O.T. 1970, No. 281, at pp. 21-22). A district court order embodying a similar limitation upon desegregation plans in a school system in which no minority race constituted 50% of the district's pupil enrollment was approved in *Kelly* v. *Guinn*, *supra*, 456 F.2d, at 110: "The 50 per cent figure is a ceiling for black enrollment imposed for the purpose of compelling a real beginning toward eliminating the effects of past segregative practices." [18]

The 1970 decree in this case also compares favorably with *Swann* in the flexibility it accorded the school board. At the time the remedial decree was fashioned, each school system was about 30% Black (although Pasadena had a larger proportion of Chicano and Asian students than Charlotte). (*See* 402 U.S., at 6; A. 440.) Judge McMillan directed in the Charlotte case that "efforts should be made to reach a 71-29 ratio in the various schools. . . ." 402 U.S., at 10 n. 4. The plan drawn by the court's consultant pursuant to these directions resulted in school racial compositions varying from 9% to 38% Black, *id.*, at 9—or from 20 percentage points below the system-wide average to 9 points above it. This

[18] In school districts of different racial composition, the "starting point," *Swann*, *supra*, 402 U.S., at 25, is of course different, and a 50% limitation would be inappropriate. *Cf. Wright* v. *Council of the City of Emporia*, *supra*; *United States* v. *Scotland Neck City Bd. of Educ.*, *supra*. The opinions of the courts below do not suggest otherwise.

Court held there had been no deviation from acceptable remedial principles.[19]

In contrast, the 1970 decree in the Pasadena case permitted variations in racial composition from 0% Black to 50% Black—or from 30 percentage points below the system-wide ratio to almost 20 percentage points above it.[20] The real reason that the "Pasadena Plan" resulted in enrollments with a far smaller variance (*e.g.*, A. 439-47) was the school board's choice, in fashioning a plan to meet the court's guideline, to preserve "neighborhood elementary schools" for all pupils through a combination of grade restructuring, pairing, and satellite zoning (A. 9).[21]

Recalling again the fact that the district court in this case had heard testimony about feasible desegregation plans for the school district, and the description of the order as a shorthand "finding, in view of available alternatives, of the extent to which racial concentration could feasibly be eliminated," we see that no particular degree of racial balance was mandated therein. Rather, the order was akin to those entered by ap-

[19] "Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court." 402 U.S., at 25.

[20] *Cf. Kelly* v. *Guinn, supra,* 456 F.2d, at 110: "The court did not impose a fixed racial ratio upon classes in the school system—some classes might have 45 per cent black students, some 15 per cent, some none."

[21] The dissenting judge in the Court of Appeals did not find the 1970 decree to establish impermissible racial quotas, but rather the district court's 1974 interpretation of the decree: "So interpreted, the injunction transforms racial balance from a means of remedying de jure segregation into an end in itself, precisely contrary to the principles expressed by the Supreme Court." 519 F.2d, at 443. This interpretation of the decree was also expressly disapproved by the majority. See text at note 15, *supra.*

pellate courts in school desegregation cases, affording school boards another opportunity to submit Constitutionally acceptable plans but requiring that district courts approve those plans only if they achieve *at least as much* desegregation as promised by plans of record, since

> [t]he district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation. . . . [*Swann, supra,* 402 U.S., at 26]

E.g., Pate v. *Dade County School Bd.,* 434 F.2d 1151 (5th Cir. 1970); *Ross* v. *Eckels,* 434 F.2d 1140 (5th Cir. 1970); *cf. Adams* v. *School Dist. No. 5,* 444 F.2d 99 (4th Cir. 1971). Contrary to Petitioners' assertion (Pet. Br., p. 12), therefore, the 1970 decree of the district court did not constitute a mandate for "racial balance."

The same is true of the district court's 1974 action declining to modify the decree. As in 1970, the Court's decision represented a judgment about the feasibility of compliance with the decree[22] and the necessity for an explicit remedial standard to guide Petitioners' actions.[23]

Just as the district court did not require an arbitrary racial balance in fashioning its 1970 decree, neither did it do so when it left that decree intact in 1974; significantly, the court was not presented with a choice between alternative formulations each of which would insure nondiscriminatory operation of the Pasadena schools. The choice was between the court's original decree and a plan which, as we argue below, the court properly found would result in the reestablishment of

[22] 375 F. Supp., at 1307, n. 11; A. 456.

[23] 375 F. Supp., at 1309; A. 459. ("Modification would . . . leave the Board to its own devices. . . .")

racially identifiable schools.[24] The district court's rejection of this proferred resegregation alternative no more demonstrates a commitment to "rigid racial balance" than do court decisions requiring that substantially disproportionate, racially identifiable schools must be desegregated to eliminate the dual system. *See, e.g., Medley* v. *School Bd. of Danville*, 482 F.2d 1061, 1062 (4th Cir. 1973), *cert. denied*, 414 U.S. 1172 (1974); *Wheeler* v. *Durham County Bd. of Educ.*, 521 F.2d 1136, 1140 (4th Cir. 1975); *Acree* v. *County Bd. of Educ.*, 458 F.2d 486 (5th Cir.), *cert. denied*, 409 U.S. 1006 (1972); *cf. Drummond* v. *Acree*, 409 U.S. 1228 (1972) (Powell, J.). The judgment below is not improper on this ground.

II

The District Court Properly Maintained Its Remedial Jurisdiction Over Petitioners To Insure Constitutional Compliance.

A. *The Court Correctly Treated Petitioners' 1974 Motion In Accordance With Traditional Equitable Principles Governing The Modification Of Injunctions.*

As this Court said in *Swann*, "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." 402 U.S., at 15-16. *See also, Millken* v. *Bradley, supra*, 418 U.S., at 753 (Stewart, J., concurring). It was entirely appropriate, therefore, for the district court to weigh Petitioners' 1974 motions in light of traditional principles of equity jurisprudence. That court had "wide discretion" in considering Petitioners' motion to modify. *System Federation No. 91* v. *Wright*, 364 U.S. 642, 648 (1961). Since the object of its decree was not "merely "so far as possible [to] eliminate the discriminatory effects of the

[24] *See* pp. 21-22 *infra*.

past" but also to "bar like discrimination in the future," *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965), the district court properly inquired whether conditions had so changed as to remove the basis upon which its original decree was entered, *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), and also whether "there exist[ed] some cognizable danger of recurrent violation" if its injunction were lifted, *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953).[25] On both counts its decision was manifestly correct, properly affirmed below, and should not be overturned by this Court.

First, the district court held that Petitioners had made no showing of changed conditions sufficient to justify either dismissal of the case or modification of the injunction. The Court of Appeals agreed, 519 F.2d, at 434-35, and we do not read Petitioners' Brief to contest these rulings.[26] Second, the trial court also held that

[25] 375 F. Supp., at 1306, 1309; A. 454, 459.

[26] The Petitioners' motion said that "[d]ue to changing circumstances within the City of Pasadena, the Board is obliged to seek modification" (A. 233), and Board President Marcheschi averred that it was "a practical impossibility to continue to comply" with the order (A. 237). The trial court rejected these contentions of infeasibility, 375 F. Supp., at 1307 n. 11; A. 456, and Petitioners have argued to this Court only that compliance "would necessarily require even a higher rate of forced busing" (Pet. Br., p. 12). There is absolutely no showing, however, that in this small district such busing would "either risk the health of the children or significantly impinge on the educational process," *Swann, supra*, 402 U.S., at 30-31. Indeed, there is no record evidence of the extent of such increase, if any.

Petitioners also sought modification on the ground that *future* changes would make the Pasadena Plan unworkable. The Superintendent's affidavit noted the pattern of increasingly large Black student enrollments at a growing number of schools, and continued:

> *If the present trend is allowed to continue*, within the framework of the existing Plan, it will become a practical impossibility to comply. . . . [A. 236 (emphasis supplied)]

But it is settled that predictions of "white flight" will not excuse a school board from performance of its Constitutional obligations.

granting Petitioners' motion would "in effect, leave the Board to its own devices" and, in the context of this case, invite the instant reestablishment of racially identifiable schools in Pasadena, 375 F. Supp., at 1307, 1309; A. 455, 459. These findings also were affirmed by the Court of Appeals, 519 F. 2d., at 434-35.[27] It is not entirely clear whether Petitioners challenge this judgment here, because their arguments on the subject are entwined with their contention that a "unitary system" was created in Pasadena when the 1970 decree was first implemented, which deprived the district court of jurisdiction to continue that decree in effect. In any event, the findings are amply supported on the record:

1. *The Alternative Plan.* If the district court had retained jurisdiction but granted Petitioners' motion to

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E.g., Monroe v. *Board of Comm'rs, supra; United States* v. *Scotland Neck City Bd. of Educ., supra; Morgan* v. *Kerrigan, supra,* slip op. at pp. 29-30. And, although Petitioners also attempted to rationalize their request by demonstrating that the original decree had become "an instrument of wrong," *Lubben* v. *Selective Service System Board No. 27,* 453 F.2d 645, 651 (2d Cir. 1972), because it prompted "white flight" and lowered educational achievement, this effort, too, failed. The record contains specific contrary evidence (*e.g.*, A. 341-46, 356-75, 386-94, 530-66); the district court credited that evidence (375 F. Supp., at 1306, 1308; A. 454, 458); the Court of Appeals upheld the trial judge's findings (519 F.2d, at 435-36) without stated disagreement by the dissenting judge; and Petitioners have apparently forsaken these claims here.

[27] Judge Wallace, dissenting, did not disagree with the prediction that the alternative plan favored by Petitioners would result in resegregation. He would have remanded in order that the district court determine "whether the segregation *foreseeable upon dissolution of the injunction* is attributable to intentionally segregative actions of the school district." 519 F.2d, at 444 (emphasis supplied). As we have previously stated, n. 15 *supra,* this approach confuses the liability and remedy stages of a case. See *Kelly* v. *Guinn, supra,* 456 F.2d, at 109-10; *cf. Wright* v. *Emporia, supra.* In addition, we submit that it is far more likely to lead to prolonged, complex, and ultimately futile litigation in these cases than the standards applied by the majority below. *See Morgan* v. *Kerrigan, supra,* slip op. at pp. 23-28.

implement the "Integrated Zone/Educational Alternatives Plan" (A. 239-45), it would be leaving the racial composition of Pasadena's elementary school student bodies to the individual choices of the district's parents. The plan itself admitted that "the ethnic balance at some sites may be altered" from that effectuated by the 1970 decree. Indeed, it made provision for "half-day-a-week pairing" of substantially disproportionate schools (A. 241). The evidence at the hearing indicated the marked changes which could be expected to occur. These were summarized with considerable understatement in the district court's opinion as resulting in eight schools "over 60 per cent black [in] enrollment," [28] leading Petitioners to charge that the district court's only objection to their proposal was that it "would not maintain the racial balance quotas that the trial court had established through the original plan." (Pet. Br., at p. 21.)

Although there were no projections of expected enrollments under the plan (A. 485-85, 492), as drafted it gave priority to students living within the "neighborhood" of a school (A. 479).[29] And if choices followed "neighborhoods," the evidence indicated that many elementary schools would be more than 75% and 85% Black, and others less than 5% Black (A. 329).[30] In sum, the Pasadena schools would mirror their pre-1970

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[28] 375 F. Supp., at 1307 n. 9; A. 455. All these schools were racially identifiable Black schools prior to the entry of the 1970 decree. *See* A. 141-45.

[29] As explained by the Board President, the alternative plan also gave "equal" priority "to children whose race is in the minority in that particular school" (A. 479). However, there was no mechanism for choosing among these competing, equal priorities (A. 487), and it is undisputed that in Pasadena, as elsewhere, white students have never voluntarily enrolled in significant numbers in formerly Black facilities (*see* A. 167-72, 193-200, 217-31).

[30] *Cf.* A. 510-11 (summer program "free choice" enrollments).

condition (A. 141-45).[31] The Board President very frankly told the district court:

> Your Honor, if I may, I agree with the court that if it had been the intent of the board or I as the primary conceiver of the modified plan to come before the court and allege with certainty that the modified plan would result in a school district with no schools having a majority of a minority race or a school district *in which there might not be any racially identifiable schools*, your Honor, I agree with you that we would be asking you to buy a pig in a poke. At the risk of being presumptuous, I consider myself to be too good a salesman to come before the court and attempt to persuade it from that poor position.

(A. 503) (emphasis supplied.)

2. *Relinquishing jurisdiction.* The district court correctly foresaw even more serious consequences if it were to relinquish jurisdiction. At the least, the court could anticipate the immediate implementation of the plan attached to Petitioners' motion, which it had concluded would not satisfy the Board's Constitutional obligations. Furthermore, it was reasonable for the court to assume that a more rigid application of "neighborhood" zoning might be instituted. The majority of the present membership of the Board of Education had campaigned on promises to "return to neighborhood

[31] As a unanimous First Circuit recently said in affirming a district court's rejection of a similar "desegregation" plan submitted by the Boston School Committee,

> . . . we must agree with the district court that schools offering programmatic alternatives, while a useful supplement to an otherwise adequate desegregation plan, could not realistically sustain the burden of achieving desegregation of the Boston city schools.

Morgan v. *Kerrigan*, No. 75-1184 (1st Cir., January 14, 1976), slip op. at pp. 11-12.

schools" and "end forced busing" (*e.g.*, A. 285), and was anxious to make good on these commitments (*see, e.g.*, A. 502).[32]

The court had earlier found that previous school boards' discriminatory adherence to their conceptions of "neighborhood schools" and "free choice" transfers were factors in the maintenance and aggravation of Pasadena's school segregation.[33] *Cf. Swann, supra*, 402 U.S. at 21; *Green, supra.* Moreover, there was also evidence of violations of the 1970 decree in the selection and appointment of principals and other administrative staff (*see* A. 264-65, 317-21, 514-18, 606-07; *cf.* A. 268). Although the district court made no direct reference to this evidence in its opinion or order denying the Petitioners' 1974 motions, in a subsequent proceeding (now before the Court of Appeals for review[34]) the district court ruled that Petitioners had violated the order and thus failed to carry out their affirmative Constitutional duty to overcome the prior deliberate faculty and ad-

[32] Contrary to Petitioners' arguments, the denial of the motion to modify or dissolve the 1970 decree hardly means that "Judge Real wants the board also to abstain from speaking out against forced busing and holds that its failure to do so amounts to continuing segregation" (Pet. Br., p. 19). No injunction restricting the Board members' expression of their views has been entered. The Board members have, quite properly, been enjoined from acting upon their views in a manner which would perpetuate or reinstitute the unconstitutional dual school system which existed in Pasadena prior to the court's 1970 decree. And the district court correctly took the school board members' views into account in estimating the "cognizable danger of recurrent violations," *United States* v. *W. T. Grant Co., supra*, if it relinquished its jurisdiction. The sole Black member of the board stated in an affidavit "that it is the intention and design of the majority of the Board to have a negative impact upon integration in the Pasadena Unified School District and that it is their ultimate intention to seek a return to segregated schools in this school district" (A. 267).

[33] 311 F. Supp., at 504, 521; A. 98, 127.

[34] 9th Cir. No. 74-2530.

ministrative segregation in the district.[35] The court could properly consider this evidence as well in making its determination as to the appropriateness of continuing jurisdiction.

Thus, unless school desegregation cases are markedly unlike other suits in equity, there was abundant justification for the district court's denial, in this instance, of Petitioners' 1974 motions. While phrases such as "end-[ing] . . . judicial control of the Pasadena educational system," and "reliev[ing Petitioners] of the trial court's yoke" beg attention, in view of the strong tradition of "local control over the operation of schools," *Milliken* v. *Bradley*, *supra*, 418 U.S., at 741, these words have little application to the choice presented the district court in this case: between retaining jurisdiction or permitting the reinstatement of segregation.

B. *Petitioners Did Not Establish "Unitary Status."*

In *Swann*, *supra*, 402 U.S., at 31, this court said:

> At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems will then be "unitary" in the sense required by our decisions in *Green* and *Alexander*. [emphasis supplied]

Petitioners extract from this language the propositions that their school system became "unitary" the moment the 1970 decree of the district court was implemented, and that the trial court thereby was deprived of any further jurisdiction in the case. *See* Pet. Br., pp. 14-15. This thesis is unsupported and unpersuasive.

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[35] "Thus, under the guise of making 'temporary' administrative appointments of a continuing nature, the Board could 'permanently' frustrate the aims of the Plan relating to the hiring of minority administrators. Constitutionally, this court cannot and will not abide the transparency of such an action." *Spangler* v. *Pasadena City Bd. of Educ.*, Civ. No. 68-1438-R (C.D. Cal., August 12, 1974), at p. 6.

1. *Initial implementation of the 1970 decree did not convert Pasadena into a unitary system.* There is no question that, as to pupil assignments, the plan approved in 1970 promised—if successfully implemented and maintained for a period of time sufficient to eliminate the continuing effects of the prior discrimination—to effect a unitary school system in Pasadena. Petitioners err, however, in their contention that because the new assignments were instituted "in one fell swoop," their system immediately became unitary.[36] (*See* Pet. Br., p. 14.) For it is settled that desegregation plans satisfy the Constitution only when they work in practice, and not merely in theory. *Green* v. *County School Bd. of New Kent County*, *supra*. Indeed, this Court's instruction that district courts "should retain jurisdiction in school segregation cases to insure . . . that the goal of a desegregated, non-racially operated school system is rapidly and finally achieved," *Raney* v. *Board of Educ.*, *supra*, 491 U.S., at 449, and the language from *Swann* quoted above, both clearly indicate that conversion to a unitary system can be judged only over time. This has been the consistent holding of the federal courts which have decided the issue.

For example, desegregation decrees which at first appeared satisfactory have been reopened and altered when projected results have not materialized over time. *E.g.*, *Hereford* v. *Huntsville Bd. of Educ.*, 504 F.2d 857, 858 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975):

> We view this case as presenting no more than a motion in the district court for further relief in a typical school desegregation case where modification is indicated because of lack of success.

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[36] Petitioners also err in their assumption that Pasadena's implementation schedule was unique. Rather, complete desegregation has been the standard since this Court's decisions in *Alexander* v. *Holmes County Bd. of Educ.*, *supra* and *Carter* v. *West Feliciana Parish School Bd.*, *supra*.

Accord, Ellis v. *Board of Public Instruction*, 465 F.2d 878 (5th Cir. 1972), *cert. denied*, 419 U.S. 966 (1973); *Boykins* v. *Fairfield Bd. of Educ.*, 457 F.2d 1091 (5th Cir. 1972); *Dowell* v. *Board of Educ.*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972); *Boyd* v. *Pointe Coupee Parish School Bd.*, 505 F.2d 632 (5th Cir. 1974), *rev'g* 332 F. Supp. 994 (E.D. La. 1971); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 453 F.2d 1377 (4th Cir. 1972), *aff'g* 328 F. Supp. 1346 (W.D. N.C. 1971). The Fifth Circuit has required that jurisdiction be retained, with regular reporting to the court, for a period of at least three years, at which time a determination of unitary status may be appropriate.[37] *Wright* v. *Board of Public Instruction*, 445 F.2d 1397 (5th Cir. 1971); *Youngblood* v. *Board of Public Instruction*, 448 F.2d 770 (5th Cir. 1971); *United States* v. *Texas*, 509 F.2d 192 (5th Cir. 1975).

2. *The district court properly determined that Pasadena was not "unitary" at the time of its 1974 motions.* Petitioners' attack on the judgment below centers on the lower courts' conclusion that Pasadena had not been transformed, by the time of the hearings before the district court, into a "unitary school system." This is the central issue in the case, for as the majority opinion below notes,

[37] Even then, cases are not dismissed but placed on the inactive docket subject to being reopened for cause. *See, e.g., United States* v. *Hinds County School Bd.*, No. 28030 (5th Cir., January 9, 1974); A. 247-57. Thus, even "unitary" status would give Petitioners no license to take deliberate steps foreseeably leading to resegregation. *See Keyes* v. *School Dist. No. 1, Denver, supra; Hart* v. *Community School Bd.*, 512 F.2d 37, 50 (2d Cir. 1975); *Morgan* v. *Kerrigan*, 509 F.2d 580, 592 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Berry* v. *Benton Harbor School Dist.*, 505 F.2d 238, 243 (6th Cir. 1974); *Oliver* v. *Michigan State Bd. of Educ.*, 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *United States* v. *School Dist. of Omaha*, 521 F.2d 530, 535-36 (8th Cir.), *cert. denied*, 44 U.S.L.W. 3280 (November 11, 1975); text at pp. 31-33, *infra*.

"the question of when and under what circumstances a school district may compel a federal district court to relinquish jurisdiction and end its supervision has not yet been directly addressed by any Court of Appeals or by the United States Supreme Court." 519 F.2d, at 431 n. 1. In our view, the courts below were correct in concluding that Petitioners had *not* completed the transition to unitary status at the time of the district court's ruling; thus, this case may not present an appropriate vehicle for answering that question.

Petitioners argue that jurisdiction (or its effective complement, authority to review school assignments) must be surrendered at the moment when a system becomes "unitary." We agree that the existence of a "unitary system" is a necessary prerequisite to either dismissal of a school desegregation case or to placement on the inactive docket. However, we submit, that condition is achieved only when a district court is satisfied that racial discrimination has been eliminated "root and branch," *Green, supra*, 391 U.S., at 438; a school board seeking dismissal or inactive status must demonstrate more than grudging compliance with a remedial decree.

Just as "[t]here is no universal answer to complex problems of desegregation," *Green, supra*, 391 U.S., at 439, so there is no simple formula for determining when a school system has become "unitary."[38] As with other critical decisions in the course of school litigation, this Court must "rely to a large extent . . . on the informed judgment of the district courts in the first instance . . . ." *Swann, supra*, 402 U.S., at 28. Obviously, the district courts, closest to the litigation, are in the best position to weigh all relevant facts and to determine whether all vestiges of discrimination have been eliminated. This Court should not lightly overturn a trial court's decision to maintain further supervision in order to complete

[38] In *Swann*, the parties agreed that "unitary" status had not been achieved. 402 U.S., at 7.

that task, nor counsel undue haste in ending judicial oversight; it may take more than a year or two to undo the results of decades of segregatory practices.[39]

In this case, there was no infirmity in the district court's ruling. Petitioners do not fairly characterize either the evidence presented to the court or the basis for the ruling when they focus only upon deviations from the "no majority of any minority" standard and their own, well-publicized commitment to changing Pasadena's pupil assignment plan (Pet. Br., pp. 16-20). The district court properly could and did consider a variety of factors before concluding that Pasadena was not "unitary."

Any determination that a school system previously segregated by law or by official act has become "unitary" must, at a minimum, be based upon a finding that there has been compliance with remedial judicial decrees. But, as we have argued, Constitutional sufficiency is achieved only when there has been, in addition, compliance with a plan that has proved *effective* to eliminate the vestiges of segregation.[40] Thus, irrespective of whether the "no majority of any minority" provision required literal compliance annually, or stated an overall objective that was feasible, the district court acted responsibly in examining the pattern of school enrollments which had developed by 1974. This scrutiny indicated a trend towards reestablishment of racially identifiable schools about which the district court was naturally concerned,[41] for

[39] In this case, for example, the district court found official action contributing to segregation which dated back to the construction of the Cleveland Elementary School in 1934. (311 F. Supp., at 517; A. 120.)

[40] *See* pp. 25-26 *supra*.

[41] Petitioners argue that demographic changes caused only minor shifts from the results anticipated in 1970, and that such shifts did not "destro[y] the unitary nature of the system created in 1970." (Pet. Br., p. 18.) It is evident, however, that the issue before the district court was whether its decree, as effectuated, had created a unitary system.

rapid resegregation certainly indicated ineffectiveness in either the design or execution of the court's decree.

Petitioners also misconstrue the district court's discussion of their vocal opposition to "forced busing" (375 F. Supp., at 1305-06; A. 453). The district court did not hold that Petitioners' "failure ["to abstain from speaking out against forced busing"] amounts to continuing segregation" (Pet. Br., p. 19). Rather, the court examined Petitioners' statements and conduct in an attempt to assess whether realistic efforts had been made to implement the decree,[42] and what would be the effect of the free choice alternative submitted in 1974. A school system that purported to make nonracial decisions only reluctantly and under the pressure of a mandatory injunction from 1970 to 1974, and which stood ready to resume at best ineffective and at worst unlawful ways as soon as restraints were lifted, could hardly be said to be "unitary," for we reiterate that the court's obligation was to "bar like discrimination in the future." *Louisiana* v. *United States*, *supra*.

The district court was also presented with other evidence directly relevant to the determination of "unitary" or "nonunitary" status. It knew that Petitioners had failed to follow the procedures established in their plan, approved in its 1970 decree, requiring affirmative action in the hiring and promotion of administrators to overcome prior discrimination.[43] It was simultaneously presented with a new pupil assignment scheme which it was informed Petitioners would implement, if permitted, and which would reestablish racially identifiable schools

[42] The district court commented: "No one can now estimate the possible results of the Pasadena Plan had it enjoyed the continued support of a Board who would act, as they profess, to 'do unto others as you would have done unto you.'" 375 F. Supp., at 1308; A. 458.

[43] *See* pp. 23-24, *supra*.

in Pasadena through "free choice" devices which had not, in the past, demonstrated any integrative potential in Pasadena."[44] These facts were reflective of the school board's attitude toward desegregation, and were indicative of whether a "unitary system" had been established. For, as this Court observed in *Keyes*, *supra*, 413 U.S., at 196, with respect to individual schools:

> What is or is not a segregated school [system] will necessarily depend on the facts of each particular case. In addition to the racial and ethnic composition of [the] school[s'] student bod[ies], other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school[s], must be taken into consideration.

Taking all of the circumstances into account, it is difficult to find fault with the district court's conclusion that

> . . . I think from the evidence presented to me I still find some vestiges that would indicate that the Board has not completely made this School District a unitary school district.

(Oral Opinion of district court, quoted at 519 F.2d, at 444 n. 7). As the majority below stated,

> On the specific facts of this case as revealed from the record and reiterated *supra*, it was reasonable for the District Court to conclude that full and effective elimination of racial discrimination had not been achieved during the three school years following the initial year in which the Pasadena plan was in effect. [519 F.2d, at 437.]

An instructive contrast to this case is the recent order entered by Judge McMillan in the *Swann* case, closing the record and placing the case on inactive status. Judge McMillan found:

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[44] See pp. 20-22 *supra*.

> Since early 1974, the case has been quiet. No new or old issues have been raised by the litigants or decided by the court. The new Board has taken a more positive attitude toward desegregation and has at last openly supported affirmative action to cope with recurrent racial problems in pupil assignment. Though continuing problems remain, as hangovers from previous active discrimination, defendants are actively and intelligently addressing these problems without court intervention. It is time, in the tenor of the previous order, to be "closing the suit as an active matter of litigation . . . ."
>
> Dismissal is neither usual nor correct in a case like this where continuing injunctive or mandatory relief has been required. Facts and issues once decided on their merits ought, generally, to remain decided. This case contains many orders of continuing effect, and could be re-opened upon proper showing that those orders are not being observed. The court does not anticipate any action by the defendants to justify a re-opening; does not anticipate any motion by plaintiffs to re-open; and does not intend lightly to grant any such motion if made. This order intends therefore to close the file; to leave the constitutional operation of the schools to the Board, which assumed that burden after the latest election; and to express again a deep appreciation to the Board members, community leaders, school administrators, teachers and parents who have made it possible to end this litigation.

Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, Civ. No. 1974 (W.D.N.C., July 11, 1975).

3. *The district court was right in refusing to permit implementation of Petitioners' alternative plan, even if Petitioners would otherwise have been entitled to have the case placed on inactive status.* Even if the district court had been of the view that Petitioners' actions from 1970 to 1974, and the results thereof, were sufficient to suggest that a "unitary school system" was nearly achieved, so

that the lawsuit might be removed from the active docket (*see* note 26 *supra*), it does not follow that the court was without authority to prevent Petitioners from implementing their alternative plan. It is one thing to say that

> [n]either school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system

(*Swann, supra*, 402 U.S., at 31-32), and quite another to insist that a school district which was deliberately segregated by official action may, after initial implementation of an adequate desegregation decree, choose to return to a pupil assignment technique which is ineffective to prevent segregation and pursuant to which schools would reassume the racial identities they had under the dual system.

The posture of this case in the district court was not an unusual one. School districts have frequently sought to reinstitute discriminatory assignment methods after a brief flirtation with a Constitutional plan. *E.g., Lemon* v. *Bossier Parish School Bd.*, 444 F.2d 1400, 446 F.2d 911 (5th Cir. 1971). *See also, Wright* v. *Council of the City of Emporia, supra.*[45] In these instances, federal courts

[45] Except for the timing and the particular "unitary system" claim made by Petitioners, this case bears a remarkable resemblance to *Emporia*. Each involves a new assignment plan sought to be justified on educational grounds in the district court; each involves a claim that "white flight" necessitated the change; each involves a district court judgment about the substantiality of enrollment ratio variances within a school district under a duty to desegregate; and in each there is other evidence bearing on the permissibility of the change. And even as to timing, the cases are more similar than different because it is clear from the record in this action that Petitioners' proposal (or one more blatantly segregative, *see* A. 422-34, 479-84) would have been presented to the district court in 1971 had the recall election succeeded (*see* A. 272-81).

have determined whether the new proposals "hinde[r] or furthe[r] the process of school desegregation. If the proposal would impede the dismantling of the dual system, then a district court, in the exercise of its discretion, may enjoin it from being carried out." *Wright, supra*, 407 U.S., at 460. *Cf. United States* v. *Scotland Neck City Bd. of Educ., supra.*

These standards are applicable to the instant case. Even if the district court had placed this matter on the inactive docket in 1974, the plaintiffs would have been entitled to reopen in order to prevent implementation of the Petitioners' alternative plan, unless Petitioners could make a better showing than they did below of the plan's potential for avoiding reimposition of the dual system. It simply confounds common sense to suggest that the elimination of racial discrimination is totally completed on a given day, and that new and segregative assignment methods must thereafter be judged without reference to the prior Constitutional violation. *Cf. Keyes* v. *School Dist. No. 1, Denver, supra.*

Finally, Petitioners argue that the trial court invalidly rejected "an educational decision by the Pasadena School Board" (Pet. Br., p. 23). However, the record indicates, and the district court found,[46] that the educational innovations contained in Petitioners' alternative plan could, and already were, being offered within the framework of the 1970 decree. But whatever the considrations advanced by Petitioners, the district court acted correctly in preventing deliberate action which would foreseeably have increased segregation and threatened the existence of a "unitary" school system. See *Keyes, supra; Wright, supra;* cases cited in note 37 *supra; cf. Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974).

[46] *See* A. 511-13, 526-29; 375 F. Supp., at 1308, A. 457.

III

Reversal of the Judgment Below Would Encourage New Schemes To Evade or Frustrate The Mandate Of the Fourteenth Amendment.

We have argued above that the judgments of the district court and the Court of Appeals in this case are consistent with the school desegregation cases previously decided by this Court. *Amici* also feel constrained, based on their long and intimate familiarity with the course of school desegregation efforts in this country,[47] to address the broader effects to be anticipated from a decision by this Court in Petitioners' favor. For such a decision would have ramifications beyond the narrow facts of the instant case.

Amici believe that reversal of the judgments of the courts below will inevitably encourage—and even resuscitate—efforts to subvert school desegregation decrees. Regrettably, these renewed efforts will come just at the point when these decrees have, by virtue of perseverance, begun to offer the promise of altering the ingrained discriminatory habits of the past. Whatever the explicit reasoning of an opinion that fails to sustain the result below, a reversal will be perceived by those who have never accepted Constitutional authority as a signal that affirmative Constitutional obligations need be grudgingly satisfied for a brief period of years only, before returning to a system of segregated education. And, to paraphrase this Court's opinion in *Swann*, the future will bring renewed "deliberate resistance of some to the Court's mandates" and "fresh evidence of the dilatory tactics of many school authorities." 402 U.S., at 13, 14.

This Court, the Courts of Appeals, and the District Courts have been quite properly solicitous of ending an active federal judicial role in school desegregation cases

[47] *See* note 3, *supra*.

at the earliest opportunity. This Court's prior decisions suggest that opportunity will arise when a district court is satisfied that a unitary system—which (1) effectively implements an acceptable means of pupil assignment, (2) achieves *actual* desegregation, and (3) eliminates other vestiges of discrimination—has been constructed and will be maintained. *Green* v. *County School Bd. of New Kent County, supra; Raney* v. *Board of Educ., supra; Alexander* v. *Holmes County Bd. of Educ., supra; Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra.* Pursuant to this standard, scores of desegregation actions have been closed on the active dockets of United States District Courts. Most of these cases are in the South,[48] but in Northern cases as well, experience indicates that controversy over desegregation fades and acceptance grows after the initial period of implementation.[49]

This achievement, which represents nothing less than bringing to substantial fruition the promise of *Brown*, would be jeopardized by a decision that weakens the authority of the district courts to retain active jurisdiction until they are satisfied that a unitary system has been implanted. Equally tragic, a decision in Petitioners' favor in the instant cases will also be interpreted as a withdrawal of this Court's support for the courageous, untiring efforts of district judges to uphold the Constitution which have characterized the history of school desegregation since 1954.

We respectfully submit that these developments are both foreseeable and relevant to the disposition of this

[48] For example, to *amici's* knowledge, cases throughout Virginia, North Carolina, Georgia, Florida, Mississippi and Louisiana have been closed by the entry of decrees similar to those set out at A. 247-57. Such cases include both *Green* v. *County School Bd. of New Kent County* and *Swann*, see p. 31 *supra*.

[49] *See, e.g.*, N.Y. Times, Dec. 3, 1975, p. 30 (Pontiac, Michigan).

cause. Petitioners' 1974 motions were the culmination of a campaign against the judicial finding of unlawful segregation and the judicial decree to remedy it which began virtually the day the decree was entered. That the methods employed were more ingenious than direct resistance, *see Cooper* v. *Aaron*, *supra*, is of little solace to the minority citizens of Pasadena who face the reconstruction of a racially divided school system if the latest campaign is permitted to succeed, although earlier efforts did not. In short, this case involves the continued integrity of the commitment in *Brown* to a complete transition to a racially nondiscriminatory system of schooling. We urge the Court not to weaken that commitment, but rather to keep alive for future generations the hope for an open society which was kindled twenty-two years ago.

CONCLUSION

For the foregoing reasons, *amici* urge that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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